IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 78-97

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

CHARLES W. DAHM, O. P.,

and

JACK ECKERD, Administrator, General Services Administration; GENERAL SERVICES ADMINISTRATION; WILLIE O. GREEN, Chicago Field Director of Contract Compliance, General Services Administration; E. E. MITCHELL, Director of Contract Compliance, General Services Administration; WILLIAM J. USERY, JR., Secretary of Labor; LAWRENCE Z. LORBER, Director, Office of Federal Contract Compliance Programs, United States Department of Labor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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FCR
BRIEF

Supreme Court Review

Petition Filed:

Ruling Below (CA 7, 731 FCRA-9):
Freedom of Information--Disclosure--Regulations--Disclosure made pursuant to agency regulations issued under 5 U.S.C. §301 are "authorized by law" and therefore not prohibited by ~~18~~ 18 U.S.C. §1905 and exempt from release under FOIA Exemption ~~3~~ (3). Moreover, as held in Chrysler Corp. v. Schlesinger, ~~565 F.2d 1172~~ by the Third Circuit 565 F.2d 1172 (702 FCR A-4), neither Section 1905 nor the FOIA itself ~~provides~~ authorizes reverse FOIA suits. The proper avenue of review in such suits is through the Administrative Procedure Act using 28 U.S.C. §1331 or §1337 as a basis for jurisdiction. Application of the four tests set out in Cort v. Ash, 422 U.S. 66, indicates that on balance Section 1905 should not be ~~interpreted~~ interpreted to imply a private cause of action.

Questions presented: Does ~~either~~ the Freedom of Information Act or 18 ~~U.S.C.~~ U.S.C. §1905 provide a person who has submitted confidential commercial information to a federal agency with a cause of action to challenge the proposed public disclosure of that information? Do agency disclosure regulations issued pursuant to 5 U.S.C. §301, the FOIA or E.O. 11246 constitute "authorization by law" within the meaning of 18 U.S.C. §1905, that permit public disclosure of confidential commercial information? If not, does 18 U.S.C. §1905 constitute a specific statutory exemption from disclosure under Exemption 3 of the FOIA? (Sears, Roebuck and Co. v. Dahm, Sup. Ct. No. 78-97, 7/17/78)

FREEDOM OF INFORMATION: 18 USC 1905 NO BASIS FOR BARRING FOIA DISCLOSURE, APPEALS COURT AFFIRMS

The U.S. Court of Appeals for the Seventh Circuit vacates a preliminary injunction that prohibited the disclosure of certain confidential statistical data submitted by Sears under Executive Order 11246, holding that exemption (b) (3) of the Freedom of Information Act, 5 USC §552, and 18 USC §1905, taken together, neither forbid disclosure of the data nor even provide a basis for an implied cause of action by an information supplier. (Sears, Roebuck and Co. v. Eckerd, CA-7, 4/25/78)

Sears had submitted equal employment opportunity reports and affirmative action programs to the Department of Labor's Office of Federal Contract Compliance and it compliance agencies.

In 1976, Sears was informed that under the FOIA, Father Dahm of the Dominican Order had requested copies of Sears' 1974 affirmative action program for its corporate headquarters and that the Government intended to furnish the information. Despite Sears' appeals, both the GSA and the OFCC upheld the decision to disclose the data.

Sears filed a complaint, charging that 18 U.S.C. §1905 prohibits the disclosure of its statistical data and that exemption (b) (3) of the FOIA therefore exempts the data from disclosure. Sears sought declaratory and injunctive relief. The U.S. District Court for the Northern District of Illinois granted Sears a temporary restraining order which was continued in effect until the hearing on Sears' motion for a preliminary injunction.

The district court then granted Sears a preliminary injunction. The court noted that Sears had tendered Father Dahm cumulative national and Chicago area statistical information concerning the racial and sexual composition of its workforce. Sears had declined to provide Father Dahm with the headquarters data, claiming that it was confidential.

The district court concluded that if the data was disclosed, Sears would suffer irreparable injury. The court also held that 18 U.S.C. §1905 prohibited the Government from disclosing the information and that there was a reasonable probability that Sears would prevail on its FOIA exemption (b)(3) claim.

In December 1976, Father Dahm was given leave to intervene in this action. His motion to dissolve the preliminary injunction was denied, resulting in his taking this appeal.

Disclosure Not Forbidden By Statute: Sears contended that the requested documents are "specifically exempted from disclosure by statute", the FOIA (b)(3) exemption, by 18 U.S.C. §1905, a criminal statute restricting disclosure of confidential information by federal employees. The act forbids disclosure, not authorized by law, of any information by a federal employee.

The Government and Dahm contend that the OFCC regulations were clearly authorized under 5 U.S.C. §301 so that the proposed disclosure is "authorized by law" and immunized from the prohibitions of §1905.

Sears asserted that agency regulations valid under §301 do not constitute authorization by law for purposes of §1905.

The appeals court disagrees with Sears, relying heavily upon Chrysler Corp. v. Schlesinger, (702 FCR A-4) 565 F.2d 1172 (3d Cir. 1977), certiorari granted, 46 U.S.L.W. 3552, and holding that regulations valid under Section 301 satisfy the "authorized by law" exception to Section 1905. The court reasoned that if validly promulgated regulations have the force of law, they satisfy the "authorized by law" exemption.

Sears' only argument about the interrelationship of Sections 301 and 1905 not fully discussed in Chrysler is Sears' assertion, supported in Westinghouse Electric Corp. v. Schlesinger, (652 FCR A-1) 542 F. 2d 1190, 1215 (4th Cir. 1976), certiorari denied, 431 U.S. 924, that the holding in Chrysler would give Government officials "the unbridled freedom to redefine the scope of [their own] illegal conduct under Section 1905." Sears reasons that an independent statutory authorization should be necessary.

The court notes that Sears is not left without a defense against agency disclosure because it could obtain review under the Administrative Procedure Act, 5 U.S.C. §701 et seq.

The court also found two problems with Sears' position. First, it assumes the answer to the unresolved question whether Section 1905 was intended to restrict agency action as a whole in addition to the individual employees of an agency. The court decided that "limiting the statute's focus to actions by agency employees seems more consistent with the statutory scheme because the enforcement mechanism of the statute provides only penalties for guilty individuals and offers no restraint on agency action."

Second, "it would be unreasonable to infer a requirement of independent statutory authorization because of the tedious and difficult job that such a requirement would force Congress to undertake." Thus, the court found no persuasive reason for deviating from the Chrysler holding that disclosure of the requested information is not forbidden by Section 1905.

Cause of Action: The circuit court determined that even if Section 1905 did forbid disclosure, neither it nor the FOIA permits this cause of action. The proper avenue to secure judicial review is through the Administrative Procedure Act, using 28 U.S.C. §1331 or §1337 as a basis for jurisdiction. Sears rejected this avenue because the APA does not allow de novo review.

Applying the four tests established in Cort v. Ash, 422 U.S. 66, to discover whether Congress had intended to imply a cause of action, the court determined that, on balance, a civil remedy is not available under Section 1905. Although no federal interest is involved and the history of a Section 1905 predecessor statute indicates a motivation to protect the privacy of taxpayers who submit information to the Government, the court noted that nothing in §1905's legislative history indicates an intent to create a civil remedy.

Nor would implying a civil remedy be consistent with the purposes of the statute, the court found.

The court held that the reasons for implying a cause of action under the FOIA seem to be considerably weaker. Although the FOIA reflects some degree of congressional concern for disclosing private information, "it is clear that the primary beneficiaries of the Act are the requesters." The claim of submitters as beneficiaries is further undercut because "only requesters have been given a cause of action by the Congress." Thus, implying a cause of action under the FOIA must also be rejected.

Text of the decision appears in Section E.

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ACCOUNTING: CASB REVISES, REISSUES FOR COMMENT PROPOSED STANDARD ON ACCOUNTING FOR INSURANCE COSTS

The Cost Accounting Standards Board has revised and offered a second time for comment (by June 30, 1978) a proposed Standard No. 416, "Accounting for Insurance Costs," to provide criteria for the measurement of insurance costs, the assignment of such costs to cost accounting periods, and the allocation of insurance costs to cost objectives.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Sears, Roebuck and Co. ("Sears") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 25, 1978 (App. A, p. A1).

OPINIONS BELOW.

The opinion of the Court of Appeals (App. B, pp. A3-A15) and its order denying rehearing (App. D, p. A23) are not as yet officially reported. The memorandum and order of the District Court (App. C, pp. A16-A22) are reported at ..... F. Supp. ..... (N. D. Ill., 1976).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 25, 1978. App. A, p. A1. A timely petition for rehearing was filed on May 8, 1978, and denied on June 1, 1978 App. D, p. A23. On June 9, 1978, the Court of Appeals granted Petitioner's motion to stay issuance of its mandate pending disposition of a petition for writ of certiorari App. E, p. A24, and, on July 3, 1978, extended that stay to and including July 17, 1978, App. F, p. A26.

The jurisdiction of this Court to review this case on petition for writ of certiorari is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The instant case presents many of the same questions which are presently before this court in *Chrysler Corp.* v. *Brown*, No. 77-922, cert. granted March 6, 1978 *viz:*

1. Whether either 18 U. S. C. § 1905 or the Freedom of Information Act ("FOIA"), 5 U. S. C. § 552, provide a person who has submitted confidential commercial information to a federal agency with a cause of action to challenge the proposed public disclosure of that information.

2. Whether agency disclosure regulations promulgated pursuant to 5 U. S. C. § 301, 5 U. S. C. § 552 or Executive Order 11246 constitute "authorization by law", within the meaning

of 18 U. S. C. § 1905, that permit the public disclosure of confidential commercial information.

3. Assuming the second question is answered in the negative, whether 18 U. S. C. § 1905 constitutes a specific statutory exemption from disclosure within the meaning of Exemption 3 of the Freedom of Information Act, 5 U. S. C. § 552(b)(3).

STATUTES INVOLVED.

The provisions of Exemption 3 of the Freedom of Information Act, 5 U. S. C. § 552(b)(3) are set out in Appendix G, p. A27. The provisions of 18 U. S. C. § 1905 are set out in Appendix H, p. A28. The provisions of 5 U. S. C. § 301 are set out in Appendix I, p. A29. The relevant portions of the regulations of the Office of Federal Contract Compliance Programs (OFCCP), 41 CFR 60-40, are set out in Appendix J, pp. A29-A31.

STATEMENT OF THE CASE.

As a government contractor, Sears is required to comply with Executive Orders 11246 and 11375 (the "Executive Orders") and the various regulations promulgated thereunder. One of these regulations, 41 CFR 60-2.1 *et seq.*, requires that Sears prepare and submit equal employment opportunity reports (commonly known as "EEO-1's") as well as maintain and provide on request, written affirmation action programs (commonly known as "AAP's") for each of its facilities nationwide including its Chicago Sears Tower corporate headquarters. Under the Executive Orders, the penalty for a contractor's failure to supply such data is cancellation of existing government contracts and debarrment from future contracts.

The data provided by Sears to the government in the AAP's and EEO-1's include highly detailed narrative and statistical information regarding staffing, pay scales, and changes in em-

ployment at each unit. The data also includes information as to the number of applicants and present employees, as well as the future goals and timetables that have been established to increase the number of females and minorities in Sears' work force. The regulations require that the contractor, in creating these reports, be as objective as possible in analyzing the reasons as to why he may not have met previous goals and timetables.[1]

The Secretary of Labor has promulgated regulations, 41 CFR 60-40 (App. J, pp. A29-A31), which establish the standards for public disclosure of the information which the OFCCP and its compliance agencies have received from government contractors. Those regulations provide that affirmative action data, even if subject to FOIA exemptions, should only be withheld from disclosure if such dissemination would not impede any of the functions of the OFCCP or other agencies, or would otherwise be prohibited by law. The regulations specifically provide that EEO-1's are disclosable (41 CFR § 60-40.4; App. J. A31) and that AAP's are, for the most part, also disclosable (41 CFR § 60-40.2(b); App. J, pp. A29-A30).

This case arose in February and March, 1976 when Sears was informed by the General Services Administration ("GSA"), its compliance agency, that a FOIA request had been made by Fr. Charles W. Dahm, a Chicago clergyman acting on behalf of a religious order owning stock in Sears, for Sears' 1974 AAP and its 1973 and 1974 EEO-1's covering its Chicago corporate headquarters facility, and that GSA intended to comply with these requests. Pursuant to 41 CFR § 60-60.4(d), Sears filed objections to the proposed disclosure, which were overruled by

1. Sears supplies an EEO-1 report and AAP for each of its over 2,000 facilities. In addition to this massive amount of data, Sears has also voluntarily supplied similar data in different forms to various governmental agencies, such as the Equal Employment Opportunity Commission ("EEOC"), which is presently using that data to conduct conciliation proceedings. See *Sears, Roebuck and Co.* v. *E. E. O. C.*, ... F. 2d ....., pet. for reh. pend., (D. C. Cir. June 9, 1978), reprinted at App. K. p. A32.

GSA's Director of Contract Compliance on April 27, 1976. This decision was upheld following Sears' appeal pursuant to 41 CFR 60-60.4(d), by the Director of the OFCCP on June 24, 1976, who further informed Sears that, unless judicially restrained, the OFCCP would disclose the information on July 8, 1976. App. B, p. A5.

On July 2, 1976, Sears filed this suit requesting declaratory and injunctive relief.[2] A temporary restraining order was entered on that date and, thereafter, following an evidentiary hearing, the District Court rendered findings of fact and conclusions of law in favor of Sears and granted a preliminary injunction.[3] The Court noted that Sears had already voluntarily provided the requestor with access to "cumulative national and Chicago area statistical information concerning the racial and sexual composition of Sears' workforce"; that the requested corporate headquarters information was classified by Sears as confidential and, if released, would cause Sears irreparable injury "both economically and in terms of its present and future public relations"; that neither GSA nor the requestor would suffer prejudice by the

2. The instant case does not represent the only attempt that has been made to obtain such data from Sears. The Petitioner is also involved in other litigation seeking to prevent the disclosure of EEO-1's and AAP's for 19 of Petitioner's other individual facilities. *Sears, Roebuck and Co.* v. *G. S. A.*, 553 F. 2d 1378 (D. C. Cir. 1977), cert. denied, ... U. S. ....., 46 L. W. 3215 (1977), presently pending on remand to the District Court for the District of Columbia for a *de novo* review of the issues raised under FOIA exemptions three and four. In addition, Sears was recently successful in preventing the EEOC from disclosing affirmative action information accumulated during the investigation and conciliation of an EEOC Commissioner's charge. *Sears, Roebuck and Co.* v. *E. E. O. C., supra.* App. K, p. A32. Finally, Sears has been the subject of numerous other requests for employment information which, due to the injunction issued by the District Court in the present case, have been declined or deferred by the administrative agencies involved.

3. The Court found that it had jurisdiction under 18 U. S. C. § 1905; 28 U. S. C. § 1331; 28 U. S. C. § 1337; the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.;* the Freedom of Information Act, 5 U. S. C. § 552; and the Federal Declaratory Act, as amended, 28 U. S. C. §§ 2201-03. App. C, p. A20.

grant of a preliminary injunction; and that there was a reasonable probability that Sears would prevail on the merits of its claim that the information was exempt from disclosure under FOIA Exemption 3 because the information "constitutes confidential statistical data or is directly related or concerned therewith and GSA is, therefore, specifically prohibited from disclosing such information by 18 U. S. C. § 1905." App. C, pp. A20-A22; App. B, pp. A5-A6.

On December 7, 1976, Fr. Dahm was given leave to intervene as a plaintiff in this action. Thereafter, he moved to dissolve the preliminary injunction, but his motion was denied by the District Court on February 15, 1977. Although the federal defendants had taken no further action, the requestor subsequently appealed the refusal to dissolve the preliminary injunction to the Court of Appeals for the Seventh Circuit. That Court's resulting decision vacated the preliminary injunction and remanded the case to dismiss the entire complaint. The lower court concluded, first, that it should "follow the path charted by *Chrysler Corp.* v. *Schlesinger*, 565 F. 2d 1172, 1186-88 (3rd Cir. 1977), *certiorari granted*, [*Chrysler Corp.* v. *Brown*, ... U. S. .....,] 46 LW 3552, [Case No. 77-922 (1978)] and hold that regulations valid under 5 U. S. C. § 301 satisfy the 'authorized by law' exception of Section 1905;" and, second, that "[e]ven, if Section 1905 did forbid disclosure, we agree with the *Chrysler* opinion that neither Section 1905 nor the FOIA itself permits this cause of action. [footnote omitted]" App. B, pp. A8, A11.

REASONS FOR GRANTING THE WRIT.

A. The Instant Case Presents Questions Identical to Those Pending Before This Court in Chrysler.

This Court granted the petition for certiorari in *Chrysler* in order to decide the significant questions of federal law presented

therein,[4] and to resolve the conflict between the Third Circuit's decision in that case and the opinion of the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F. 2d 1190 (4th Cir. 1976), *cert. denied*, 431 U. S. 924 (1977), where the Government had previously sought review from this Court of similar questions.[5] The Seventh Circuit in the instant case admittedly "follow[ed] the path charted by *Chrysler*" in both deciding the scope of the "authorized by law" exception to 18 U. S. C. § 1905 and determining whether that statute or the FOIA permitted this cause of action. App. B, pp. A8, A11.

A grant of the present petition would thus provide the Court with the desirable opportunity to resolve, in a different factual setting, "arguments . . . [which] are necessarily identical." *Roe* v. *Wade*, 410 U. S. 113, 123 (1973). The Petitioner, who has fully litigated the important issues raised by *Chrysler* before several courts of appeal (see note 2, *supra*) as well as other forums, should be afforded full participation when those issues are decided. Indeed, a denial of review would occasion far more onerous consequences here than if certiorari had been declined in *Chrysler*. In contrast to that decision, the court of appeals in this case did not remand this matter back to the district court

4. As the court below noted, quoting *Chrysler* (565 F. 2d at 1186), the impact of Section 1905 "could embrace 'virtually every category of business information likely to be in the files of any federal agency'." App. B, p. A11. The size and complexity of such documentation is staggering. For example, in 1976 there were more than 5,000 federal government report forms generating approximately ten billion pieces of paper. *Report of the Surveys and Investigations Staff to the House Comm. on Appropriations, "Federal Energy Data Collection Activities and Systems"*, at p. 15, *reprinted in Dept. of Interior Hearings Before the House Comm. on Appropriations*, Part 8, pp. 341-453 (1977).

5. The Solicitor General sought certiorari in *Westinghouse* to resolve issues that are virtually identical to those raised by the instant case. The Government argued that *Westinghouse*, as does the present dispute, raises "important questions concerning the purpose of the Freedom of Information Act, its use by private parties to obtain judicial relief against the disclosure of information, and the role of the executive branch in discharging the legislative directive . . . to permit the 'fullest possible disclosure'." Pet. for Cert. in No. 76-1192, O. T. 1976.

with orders that the administrative agency provide a more detailed consideration of Sears' objections to disclosure. Instead, notwithstanding that the present case arose on an appeal from the denial of a motion to dissolve a preliminary injunction, the court dismissed Petitioner's entire complaint outright prior to *any* further review of the agency record. App. B, p. A15. Consequently, if this Court declines review, there will be no remand, and the result, unlike that which would have occurred in *Chrysler* if certiorari had been denied, would be to permit GSA to disclose the data in issue without ever having submitted its decision to any form of judicial scrutiny.

B. The Instant Case Presents the Opportunity to Resolve a Substantial Conflict Among the Courts of Appeal.

The decision below, by following *Chrysler* in holding that Section 1905 cannot limit disclosure of confidential commercial information where there are agency regulations valid under 5 U. S. C. § 301, necessarily lined up on one side of a growing dispute among the courts of appeals. The Seventh Circuit is now in agreement with the Third Circuit in *Chrysler*, and, as indicated in the decision (App. B, p. A8), the Eighth Circuit in *General Dynamics Corp.* v. *Marshall*, 572 F. 2d 1211 (1978). At the same time, however, the lower court expressly disagreed with the views of the Fourth Circuit in *Westinghouse* and the District of Columbia Circuit in *Charles River Park "A", Inc.* v. *Dept. of Housing and Urban Development*, 519 F. 2d 935 (1975). These courts reached a diametrically contrary conclusion in analyzing the same legislative history of Section 301 which the court below found to control its decision.[6] In light of the statute's purpose, as expressed in the legislative history of the 1958 amendment to Section 301—to correct a situation in which [that Section] had "become a convenient blanket to hide anything Congress may have neglected or refused to include under specific secrecy laws" (H. Rep. No. 1461, 85th Cong. 2d Sess. (1958), reprinted in [1958] U. S. C. C. & A. N. 3352)—termination of this confusion among the lower courts is critical. This Court recently construed FOIA exemption 7 to resolve a conflict among the lower courts as to the extent to which that exemption protected "specified confidentiality and privacy interests." *N. L. R. B.* v. *Robbins Tire and Rubber Co.*, ... U. S. ....., 98 LRRM 2617, 2619 (June 15, 1978). A similar ruling is now warranted with respect to FOIA exemption 3.[7]

6. Contrary to the opinion below, which held that the amendment "punctures Sears' position about agencies' inability to authorize disclosure" (App. B, p. A9), the *Charles River Park* court declared:

> The government also suggests that Section 301 authorized the release of information subject to Section 1905. We disagree. To

(Footnote continued on next page.)

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> interpret Section 301 in that way would be inconsistent with the legislative history. In 1958 an amendment was added to Section 301 which provided that the section "does not authorize withholding information from the public or limiting the availability of records to the public." However, the sponsor of the amendment, Congressman Moss, stated explicitly that the amendment did "not affect the confidential status of information given to the government and carefully detailed in Title 18, United States Code, Section 1905" 104 Cong. Rec. 6550 (1958). Section 301 does not authorize regulations limiting the scope of Section 1905. [footnotes omitted].

519 F. 2d at 942-943. See also *Babcock & Wilcox Co.* v. *Rumsfeld*, 70 F. R. D. 595, 601 (N. D. Ohio 1976); *Parkridge Hospital, Inc.* v. *Blue Cross and Blue Shield*, 430 F. Supp. 1093 (E. D. Tenn. 1977); and *Metropolitan Life Insurance Co.* v. *Usery*, 426 F. Supp. 150, 170 (D. D. C. 1976).

7. Although the Court of Appeals did not reach the question because of its conclusion that Section 301 provided sufficient authorization (App. B, p. A8, n. 8), in the event that this Court should disagree with that view, this case, like *Chrysler*, also raises the issue of whether Executive Order 11246 and the FOIA itself would support regulations eliminating Section 1905. See Br. of Pet. in *Chrysler* pp. 52-55.

C. The Instant Case Presents Significant Questions of Federal Law, Which Have Not Been, But Should Be, Decided by This Court.

1. This Court should also grant review to determine whether the decision below, in its conclusion "that neither [18 U. S. C. § 1905] nor the FOIA itself permits this cause of action" (App. B, p. A11), properly construed the tests established in *Cort* v. *Ash*, 422 U. S. 66 (1975).[8] For example:

a. The lower court initially held that, as to the second *Cort* test, "if any inference can be drawn from the legislative history [of Section 1905] it is that Congress did not think a civil action was appropriate." App. B, p. A12. As four members of this Court recently observed in *Regents of the University of California* v. *Bakke*, ... U. S. ....., 46 L. W. 4896, 4936, n. 28, (Opinion of Justice Stevens, joined by the Chief Justice and Justices Rehnquist and Stewart) however, the *Cort* test does not require a showing that the legislative history of a particular statute affirmatively intended to permit a private cause of action; instead, the test only requires that the legislative history indicate that Congress did not actually intend to *foreclose* a private right of action.

b. The lower court also found that, as to the third *Cort* test, the other test which was declared unfavorable to Sears' argument that a private remedy was available under Section 1905, "implying a civil action would not be consistent with the purpose of the statute, especially since the [Administrative Procedure Act] already provides a remedy." App. B, p. A13.

8. In *Cort* v. *Ash*, this Court found that a federal statute implied a private cause of action where (1) the person asserting the cause of action is within the class of people which the statute was designed to protect; (2) the implied private cause of action is not at odds with the legislative history of the statute; (3) the private cause of action is consistent with the underlying statutory scheme; and (4) the cause of action is not one traditionally relegated to state law.

This Court, however, in *Wyandotte Transportation Co.* v. *U. S.*, 389 U. S. 191 (1967), held that where the statutory sanction is not sufficient to enforce the goals of the statute, it is not contrary to the statutory scheme to permit a private cause of action. Such a situation surely exists under Section 1905 where the submitters of information are the only persons sufficiently interested in its enforcement so as to insure against improper government disclosure decisions. The opinion below similarly fails to recognize that, regardless of who the "primary beneficiaries" of the FOIA may be (App. B, p. A14), since that statute "grants a private party protection against disclosure, it carries with it an implied right in the private party to invoke the equity powers of a court to assure that protection." *Westinghouse*, 542 F. 2d at 1211.

c. The result of the decision below is that, since only APA review is permissible, the standard of review is one of abuse of discretion rather than *de novo* review of agency action. This conclusion is directly contrary to that reached by the Fourth Circuit in *Westinghouse* (see 542 F. 2d at 1213, 1215) and the District of Columbia Circuit.[9] It is also a recurrent question of national importance[10] worthy of guidance from this Court.

9. In *Sears, Roebuck and Co.* v. *General Services Administration*, 553 F. 2d at 1381, that court held that a party providing information is entitled to a *de novo* judicial review of any decision to disclose:

> The review standard of the FOIA in a suit to compel disclosure is also the appropriate standard in the reverse FOIA case." (citation omitted, footnotes omitted).

10. Congress, in limiting the permissible time period between requests for disclosure and final agency determination to ten days (see 1974 amendments to the FOIA, Public Law No. 93-502, 88 Stat. 1561), has effectively restricted the ability of administrative agencies to provide procedures to insure a decision making process which will protect the submitting party's due process rights absent *de novo* judicial review. See Clement, *"The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit"*, 55 Texas L. Rev. 587, 635 (1977).

2. Assuming that agency regulations promulgated under 5 U. S. C. § 301 are found to constitute "authorization by law" for purposes of Section 1905, this Court should also consider, as urged by *Chrysler* in its brief on the merits (pp. 56-61), the related question whether Section 1905 is a specific statutory exemption from disclosure within the meaning of Exemption 3 of the FOIA. Although the court below did not reach this question because of its conclusion that the contemplated disclosure in the present case would not be covered by Section 1905 (App. B, p. A7, n. 6), this "threshold" reverse FOIA question (*Sears, Roebuck and Co.* v. *GSA*, 553 F. 2d at 1385) is an important one. There is disagreement as to the extent to which this Court's decision in *FAA Administrator* v. *Robertson*, 422 U. S. 255 (975) has been eroded by the subsequent amendments to Exemption 3 (PL 94-409, 90 Stat. 1241, approved Sept. 13, 1976, codified as 5 U. S. C. § 552(b)). See *General Dynamics Corp.* v. *Marshall*, 572 F. 2d at 1217, n. 7 ("[§ 1905] does not afford a basis for exemption under § 552(b)(3)"). Cf. *Westinghouse*, 542 F. 2d at 1201-03 ("§ 1905 is a statute qualifying under Exemption 3 . . ."). See also *N. L. R. B.* v. *Robbins Tire and Rubber Co.*, ... U. S. at ....., 98 LRRM at 2630 (Concurring and dissenting opinion of Justices Powell and Brennan). The instant case provides a desirable vehicle for this Court to reevaluate *Robertson* and decide the degree to which such erosion has occurred in the context of the present dispute.

3. A serious anomaly in the administration of federal civil rights policies has been created by the decision below. While Section 709(e) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-8(e), would preclude "dissemination of EEOC investigative data to anyone not within the government" (*Sears, Roebuck and Co.* v. *E. E. O. C.*, *supra*, App. K, p. A41), the instant case would nevertheless permit GSA and other federal agencies to publicly disclose those very same documents. Congress has encouraged cooperation and the sharing of information

between various civil rights agencies; it surely did not, however, contemplate that, by virtue of such coordinated efforts, administrative agencies would then be able to abrogate the Congressional design to insure the confidentiality of EEOC investigative data.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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July 17, 1978

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 25, 1978.

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge**

SEARS, ROEBUCK & COMPANY, *Plaintiff-Appellee,* CHARLES W. DAHM, O. P., *Intervenor-Plaintiff-Appellant,* No. 77-1417 *vs.* JACK ECKERD, Administrator, General Services Administration, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76-C-2444 Frank J. McGarr, *Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Vacated, with costs, and the cause is Remanded to the district court with directions to dismiss the complaint, in accordance with the opinion of this court filed this date.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 77-1417

SEARS, ROEBUCK AND CO.,
Plaintiff-Appellee,

CHARLES W. DAHM, O. P.,
Intervenor-Plaintiff-Appellant,

vs.

JACK ECKERD, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 2444—Frank J. McGarr, Judge.

Argued December 9, 1977—Decided April 25, 1978

Before CUMMINGS and TONE, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* In July 1976, Sears, Roebuck and Co. filed a verified complaint for declaratory judgment and injunction against the General Services Administration (GSA) and five federal officers.[1] Sears alleged that a portion

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

1. The General Services Administrator; the Chicago Field Director of Contract Compliance of the General Services Administration; the Director of Contract Compliance of the General Services Administration; the Secretary of Labor; and the Director of the Office of Federal Contract Compliance Programs of the Department of Labor.

of its business consists of contracts or subcontracts with federal agencies so that it complies with Executive Orders 11246 and 11375[2] and the Regulations thereunder[3] requiring Government contractors to submit equal employment opportunity reports and other information to the Department of Labor's Office of Federal Contract Compliance (OFCC) and its Compliance Agencies. According to the complaint, the GSA is Sears' Compliance Agency. Sears has been required to submit GSA Standard Form 100-s (EEO-1's) and Affirmative Action Programs (AAP's) to the Government covering Sears' entire corporate domestic operations and each of its individual domestic establishments. Sears had also supplied other documents on a confidential basis to the Government to demonstrate its compliance with the applicable Executive Orders and Regulations.

Sears also alleged that in February 1973, the Secretary of Labor issued regulations providing that EEO-1's and AAP's will be disclosed (with exceptions) to requesting persons. In February and March 1976, the GSA informed Sears that under the Freedom of Information Act (5 U. S. C. § 552), Father Charles W. Dahm of the Dominican Order had requested copies of Sears' 1974 AAP's for its corporate headquarters in the Sears Tower in Chicago, Illinois, and that GSA intended to furnish this information to him. He had also asked for headquarters EEO-1's and supporting documents (App. 28).

According to this reverse Freedom of Information Act complaint, in June and July 1974, the GSA's Chicago Field Contract Compliance Office, pursuant to a complaint of Women Employed, undertook a compliance review of plaintiff's Sears Tower facility, and Sears tendered to the GSA investigator its 1973 and 1974 EEO-1 reports and other employment statistics (presumably already in other Government files) for its national headquarters and was assured by the investigator that the data

2. 30 C. F. R. 12319 and 14303 contain the Executive Orders.

3. 41 C. F. R. Part 60-2 *et seq.* are the regulations cited by Sears in Count One, par. 2 of its complaint.

would remain confidential. Consequently, in late March 1976, Sears filed objections to the proposed disclosure with the GSA, but those objections were overruled by the GSA's Director of Contract Compliance, causing Sears to appeal his decision to the Director of the OFCC. However, on June 24, 1976, the OFCC Director upheld the decision to disclose the data, stating that it would be released on July 8, 1976.

The complaint was filed six days before that deadline and charged that 18 U. S. C. § 1905 prohibits the disclosure of such confidential statistical data and that exemption (b)(3) of the Freedom of Information Act (5 U. S. C. § 552(b)(3), note 5 *infra*) therefore exempts the data from disclosure.[4] Consequently, Sears sought appropriate declaratory and injunctive relief. On July 2, Sears was granted a temporary restraining order which was continued in effect until the hearing on its motion for a preliminary injunction.

After hearing five witnesses on August 6, 1976, the district court rendered oral findings of fact and conclusions of law in favor of Sears. Three weeks thereafter, the court handed down its formal findings of fact and conclusions of law and granted Sears a preliminary injunction. In its findings of fact, the court reiterated the principal contents of Sears' verified complaint and noted that on February 25, 1976, Sears had tendered Father Dahm "cumulative national and Chicago area statistical information concerning the racial and sexual composition of Sears' workingforce" but that Sears had declined to provide him with the requested Sears Tower headquarters data alone. The court also found that Sears classified the Sears Tower headquarters information as confidential.

4. The complaint also relied on Section 709(3) of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e-8(e)) as prohibiting disclosure of the data and on exemptions (b)(4), (6) and (7) in the Freedom of Information Act (5 U. S. C. § 552(b)(4), (6) and (7). For purposes of this appeal, Sears does not rely on these provisions.

The district court concluded that if this data were disclosed, Sears would suffer irreparable injury "both economically and in terms of its present and future public relations." The court noted that the defendants and Father Dahm would not be subjected to prejudice by the grant of a preliminary injunction because the data requested was out of date "and the national and Chicago area data voluntarily provided by Sears should be sufficient to assess Sears' equal employment commitment and progress."

Judge McGarr held that 18 U. S. C. § 1905 prohibits the GSA from disclosing such information and that there is a reasonable probability that Sears will eventually prevail on its claim that the information is exempt from disclosure under exemption (b)(3) of the Freedom of Information Act. On December 7, 1976, Father Dahm was given leave to intervene as a plaintiff in this action. Thereafter he moved to dissolve the preliminary injunction, but his motion was denied on February 15, 1977, resulting in his taking this appeal. We vacate the order granting the preliminary injunction.

Sears seeks to justify the district court's order by contending that the (b)(3) exemption and 18 U. S. C. § 1905, taken together, forbid disclosure and provide a basis for an implied cause of action. We disagree with both contentions.

I. *Is Disclosure Forbidden by Statute?*

Relying solely on the (b)(3) exemption in this Court,[5] Sears argues that the documents requested here are "specifically exempted from disclosure by statute" for purposes of that exemption because they consist of "confidential statistical data" forbidden from disclosure by 18 U. S. C. § 1905, a criminal

5. 5 U. S. C. § 552(b)(3) as amended in 1976 contains that exemption and provides:

"(b). This section does not apply to matters that are—

* * * * *

(Footnote continued on next page.)

statute restricting disclosure of confidential information by federal employees.[6] Section 1905 provides:

> "Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent *not authorized by law* any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment." (Emphasis supplied.)

The federal defendants and the intervenor contend that the OFCC regulations[7] permitting the disclosure of these materials

(Footnote continued from preceding page.)

"(3) specifically exempted from disclosure by statute (other than Section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld."

6. Given our conclusion that the disclosure here is not covered by 18 U. S. C. § 1905, we need not decide the intervenor's claim that Section 1905 does not "specifically" exempt documents and therefore is not one of the statutes to which the (b)(3) exemption refers.

7. The applicable regulations are contained in 41 C. F. R. Part 60-40 and generally permit the disclosure of EEO-1 reports and AAP's. Sears does not contend otherwise except for a passing reference to 29 C. F. R. § 70.21(a) (Br. 20-21) which prohibits any employee of the Department of Labor from disclosing certain records "in any manner or to any extent not authorized by law."

were clearly authorized under 5 U. S. C. § 301,[8] so that the projected disclosure is "authorized by law" and thus immunized from the prohibition of Section 1905. 5 U. S. C. § 301 provides:

> "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

Sears asserts that agency regulations valid under Section 301 do not constitute authorization by law for purposes of Section 1905. We disagree. Like Judge Lay's opinion for the Eighth Circuit in *General Dynamics Corp.* v. *Marshall*, ... F. 2d ..... (No. 77-1192, decided February 14, 1978), we follow the path charted by *Chrysler Corp.* v. *Schlesinger*, 565 F. 2d 1172, 1186-1188 (3d Cir. 1977), certiorari granted, 46 LW 3552,[9] and hold that regulations valid under 5 U. S. C. § 301 satisfy the "authorized by law" exception of Section 1905.[10]

8. Because we find Section 301 to be sufficient authorization, we do not consider the other possible legal authorizations offered by the federal defendants and the intervenor: the FOIA itself and Executive Order 11246.

9. To the same effect, see Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587, 624 (1977).

10. Neither party offered any legislative history specifically addressed to the meaning of the phrase "authorized by law" in Section 1905 or in any of the three statutes that were consolidated in 1948 to form Section 1905. See Clement, *supra* note 9 at 607. However, that phrase has been construed broadly over the years by the courts (see, *e.g.*, *Blair* v. *Oesterlein Company*, 275 U. S. 220, 227; *United States* v. *Dickey*, 268 U. S. 378; *Exchange National Bank* v. *Abramson*, 295 F. Supp. 87 (D. Minn. 1969); cf. *Consumers Union* v. *Cost of Living Council*, 491 F. 2d 1396 (T. E. C. A.), certiorari denied *sub nom. Business Roundtable* v. *Consumer Union*, 416 U. S. 984), by the Attorney General (see 41 Op. Atty Gen. 166, 169 (1953); 41 Op. Atty Gen. 221 (1955) and apparently by administrative agencies. See Clement, *supra* note 9 at 619 n. 136.

Since validly promulgated regulations have the force of law (see *Public Utilities Commission of California* v. *United States*, 355 U. S. 534, 542-543; cf. *Service* v. *Dulles*, 354 U. S. 363), they satisfy the authorization requirement of 18 U. S. C. § 1905. Cf. *Smith* v. *United States*, 305 F. 2d 197, 201-202 (9th Cir. 1962), certiorari denied, 371 U. S. 890; *Laughlin* v. *United States*, 474 F. 2d 444, 453, n. 12 (D. C. Cir. 1972), certiorari denied, 412 U. S. 941. As the *Chrysler* opinion demonstrates, contrary to Sears' assertion and the opinion of the D. C. Circuit in *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development*, 519 F. 2d 935, 942-943 (1975), such a holding is consistent with the legislative history of the 1958 amendment to Section 301[11] (see 565 F. 2d at 1187); in fact if there were doubt about Congress' purpose in Section 301 it could be argued that the second sentence of that statute, added in the 1958 amendment, punctures Sears' position about agencies' inability to authorize disclosure.

The only argument about the interrelationship between Sections 301 and 1905 raised here that was not discussed fully in *Chrysler* is Sears' contention, supported by *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F. 2d 1190, 1215 (4th Cir. 1976), certiorari denied, 431 U. S. 924, that the holding in

11. Taking out of context language in a 1958 Committee report, Sears argues that Section 301 was meant to apply only to documents "which are not restricted under other specific laws." (Supp. Br. 8; 1958 U. S. Code Cong. and Ad. News 3352 (House Report No. 1461)). This phrase seems inapplicable because it apparently was offered to make the House Report consistent with the phrase "not inconsistent with law" that appeared in the earlier, pre-amendment codification but significantly does not appear in 5 U. S. C. § 301. The explanatory notes to the new Section suggest that the phrase was omitted "as surplusage" because "a regulation not inconsistent with law is invalid." It therefore appears from the history and language of Section 301 that the Section was intended to impose no independent limit on the agencies' authority and that the determinative question, discussed *infra*, is whether agency authority to disclose is inconsistent with Section 1905 and thereby inconsistent with law. As a result we need not reach the question whether, assuming Section 301 itself placed an independent limit on what information could be disclosed, that limit would cover the regulations at issue here.

Chrysler would give Government officials "the unbridled freedom to redefine the scope of [their own] illegal conduct under Section 1905" (Supp. Br. 8) and leave submitters defenseless against disclosure. Therefore, Sears reasons, an independent statutory authorization should be necessary.

As a practical matter, however, Sears is not left defenseless against agency disclosure because affected persons can obtain review under the Administrative Procedure Act (5 U. S. C. § 701 *et seq.*) See 565 F. 2d at 1190-1191. As a matter of interpreting whether Congress intended to allow agencies to define the bounds of legal conduct under Section 1905, we note two problems with Sears' position. First, Sears' argument that agencies would be allowed to redefine limits on their own conduct assumes without explanation or support the answer to the difficult and as yet unresolved question of whether Section 1905 was intended to restrict agency action as a whole in addition to individual employees of an agency. Obviously if the statute was aimed only at unwarranted actions by individual employees, allowing agencies using appropriate procedures to make clear what action was warranted would not defeat Congress' purposes. The parties did not discuss this question and it has not received significant attention with the exception of a passing reference by Attorney General Brownell, who in advising agency heads in a criminal context wrote that it could not be assumed that the statute might not be applied to agencies as a whole. 41 Op. Atty Gen. 221, 223 (1955). While this may have been good advice in the context of cautious avoidance of potential areas of criminal liability, we think such caution was unnecessary because the legislative history of at least one of the predecessors of Section 1905 reveals that those who expressed concern about disclosure (rather than just the investigatory powers involved in the predecessor legislation) seemed to focus their concern not on regulated official agency action but rather on unwarranted and uncontrollable action by "poorly paid revenue agents." 26 Cong. Rec. 6893 (1894) (remarks of Senator Aldrich). See generally Clement, *supra* note 9 at 610. Even if the legislative

history were unclear, limiting the statute's focus to actions by agency employees seems more consistent with the statutory scheme because the enforcement mechanism of the statute provides only penalties for guilty individuals and offers no restraint on agency action.

Second, Sears' insistence on an independent statutory authorization would mean that each time Congress wanted to except an item or class of items from Section 1905 it would have to do so by statute in a manner with sufficient specificity to avoid agency discretion. Given that Section 1905 if read literally could embrace "virtually every category of business information likely to be in the files of any federal agency" (565 F. 2d at 1186), and that Congress in the FOIA has adopted a basic policy of disclosure (*Department of the Air Force* v. *Rose,* 425 U. S. 352, 361), certainly if a statute such as Section 1905 were passed today it would be unreasonable to infer a requirement of independent statutory authorization because of the tedious and difficult job that such a requirement would force Congress to undertake. Cf. *Federal Aviation Administration* v. *Robertson,* 422 U. S. 255, 265-266. Particularly in light of the precedent in 1948 for agency regulations limiting Section 1905 (see Clement, *supra* note 9 at 619 n. 136) and Congress' apparent desire not to alter the substantive scope of Section 1905 (see Clement, *supra* note 9 at 618), we similarly decline to impart to the 1948 Congress an intention to require an independent authorization for exempting any item from the broad confines of Section 1905. Thus Sears offers no persuasive reason for deviating from the holding in *Chrysler* that disclosure of the information requested here is not forbidden by Section 1905.

II. *Does the Submitter of Information Have a Cause of Action?*

Even if Section 1905 did forbid disclosure, we agree with the *Chrysler* opinion that neither Section 1905 nor the FOIA itself permits this cause of action. See 565 F. 2d at 1185, 1188. As *Chrysler* held, the proper avenue to secure judicial review

is through the Administrative Procedure Act, using 28 U. S. C. § 1331 or § 1337 as a basis for jurisdiction.[12] See 565 F. 2d at 1191-1192; see also Clement, *supra* note 9 at 626-633. Defendant federal officials agree that APA review is appropriate, but Sears seeks review under Section 1905 or the FOIA because the APA would not allow *de novo* review. See 565 F. 2d at 1191; 5 U. S. C. § 605(2)(A).

Applying the four tests established in *Cort* v. *Ash*, 422 U. S. 66, 78,[13] to determine whether a civil remedy is available first under Section 1905 indicates that on balance Section 1905 should not be interpreted to imply a private cause of action. Beginning with the second of the *Cort* tests, Sears points to nothing in the legislative history indicating an intent to create such a remedy;[14] the only apparent relevant item of history is that at least as to one of Section 1905's predecessors it was at one time argued that the criminal penalty provision was "valueless," but no attempt was made to compensate with a civil action. See Clement, *supra* note 9 at 611 n. 102. Thus if any inference can be drawn from the legislative history it is that Congress did not think a civil action was appropriate. As

12. The Administrative Procedure Act does not itself confer jurisdiction. *Califano* v. *Sanders*, 430 U. S. 99; see Clement, *supra* note 9 at 627-628.

13. *J. I. Case* v. *Borak*, 377 U. S. 426, is inapplicable because under the statutory scheme there the courts were expressly granted a broad authority to enforce any liability or duty created by the Securities Exchange Act of 1934. See Clement, *supra* note 9, at 624-625 n. 170. Further, in *Borak* "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." *Cort* v. *Ash*, 422 U. S. 66, 79.

14. Because neither party offered any item of legislative history bearing on intent, each argued that the burden of proof on this test was on the other party. Our view is that if there is no evidence on intent, neither party can claim the benefit of that test and the test simply offers no insight into whether a cause of action should be implied. In the final analysis it seems fair to infer from the manner in which the Supreme Court established the tests that plaintiff must prevail on at least one test in order to justify a cause of action (see note 16 *infra*); thus the failure of proof may be of more detriment to the plaintiff.

to the third test, we agree with Judge Gibbons in *Chrysler* that implying a civil action would not be consistent with the purpose of the statute, especially since the APA already provides a remedy. See 565 F. 2d at 1188.[15]

The remaining tests are not so unfavorable to the plaintiff. Because the civil action sought would involve enjoining federal agencies, it of course is not an action traditionally relegated to state law and thus no federalism interest would be affected if a cause of action were implied. Turning to the first *Cort* test, the history of at least one of Section 1905's predecessor statute does indicate that one of its motivations may have been an effort to protect the privacy of taxpayers who submitted information to the Government. See Clement, *supra* note 9 at 608, 610. Even assuming that all submitters of information are therefore "one of the class for whose especial benefit the statute was enacted" (422 U. S. at 78), we would hold that on balance it is not appropriate to imply a cause of action based on the weight that the Supreme Court appears to give to the third factor of whether the requested cause of action is necessary to ensure the fulfillment of Congress' purposes. See *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 477.[16]

15. Sears insists that it would be consistent with the purposes of Section 1905 to imply a cause of action because the criminal penalties are inadequate. Its claim of inadequacy is based on the "plethora" of reverse FOIA suits, which it asserts proves that the Government has ignored Section 1905, and the lack of criminal prosecutions under the Section. However, these facts do not necessarily prove that the penalties are inadequate to deter what Section 1905 was meant to deter but more likely prove that Sears' substantive interpretation of the Section has not been accepted. What Sears seems to be concerned about is not finding a better sanction to avoid the disclosure that the statute is interpreted to prohibit but rather another opportunity to litigate what information is included within the statute's protections.

16. Although the Supreme Court has not indicated the relative weight to be given to the four tests and that issue, despite its potential significance, has received little attention (cf. *Rauch* v. *United Instruments, Inc.*, 548 F. 2d 452, 460 (3d Cir. 1976)), an analysis of those tests and the cases applying them indicates that proof by the plaintiff that it satisfies the first test is generally insufficient to justify

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Judge Gibbons' opinion in *Chrysler* clearly demonstrates why an implied cause of action under the FOIA would not satisfy the second and third prongs of the *Cort* test. 565 F. 2d at 1185-1186. As to the remainder of the test, our analysis of the proposed cause of action under Section 1905 is applicable to the FOIA claim as well, except that under the FOIA Sears' claim to be one of the especial beneficiaries of the statute seems considerably weaker. Without denying that the FOIA reflects some degree of Congressional concern about disclosing private information (see 565 F. 2d at 1184), it is clear that the primary beneficiaries of the Act are the requesters. See *Department of the Air Force* v. *Rose*, 425 U. S. 352, 361. Whether or not submitters therefore should be lumped with indirect and secondary beneficiaries of other statutes (see *Cort* v. *Ash*, 422 U. S. at 81), their claim as especial beneficiaries is undercut since only requesters have been given a cause of action by the Congress. 5 U. S. C. § 552(a)(4)(B). Thus the claim of a cause of action under the FOIA is even weaker than the claim

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implying a cause of action. See *Starbuck* v. *City and County of San Francisco*, 556 F. 2d 450, 455 (9th Cir. 1977); Note, *Implying Private Causes of Action from Federal Statutes*: Amtrak *and* Cort *Apply the Brakes*, 17 B. C. Ind. L. Rev. 53, 58 n. 126. Without mandating its application in an extreme case, this result seems sensible because the first test, whether plaintiff is in the benefited class, seems in large part a method of inferring the legislative intent and purposes addressed in the second and third tests. If the latter tests indicate that implying a cause of action is inappropriate, it is likely that the inference produced by the first test has been rebutted.

While not denying its potential significance, we also do not find compelling the fact that the cause of action is not one traditionally relegated to state law. When this factor is not present it merely indicates that no federalism interest would be affected if a cause of action were implied; it does not add any positive encouragement for the creation of a cause of action. Even those cases finding this factor present have questioned its significance under certain circumstances. See *e.g.*, *Kipperman* v. *Academy Life Ins.*, 554 F. 2d 377, 380 (9th Cir. 1977). Moreover, although the prime focus of this concern is federalism, it should be noted that to the extent this inquiry may be in part concerned with whether the plaintiff will have any remedy if one is not implied (cf. *Mason* v. *Belieu*, 543 F. 2d 215, 221 (D. C. Cir. 1976)), that concern is satisfied here.

under Section 1905 and must be rejected similarly. See 565 F. 2d at 1191-1192; see also Clement, *supra* note 9 at 626-633.

Since Sears has posited its case upon 18 U. S. C. § 1905, and since that statute would not warrant the grant of the relief sought, the complaint must be dismissed. There is no need for a further hearing because the present record supports the projected disclosure. See App. 2-10. The purpose of the Freedom of Information Act was to foster "the fullest responsible disclosure." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Plaintiff has not persuaded us or the officials in charge that this disclosure would be irresponsible. Accordingly, the order granting the preliminary injunction is vacated and the cause is remanded to the district court with directions to dismiss the complaint.

APPENDIX C

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

SEARS, ROEBUCK AND CO.,
Plaintiff,
vs.
JACK ECKERD, Administrator, General Services Administration, GENERAL SERVICES ADMINISTRATION: WILLIE O. GREEN, Chicago Field Director of Contract Compliance, General Services Administration; E. E. MITCHELL, Director of Contract Compliance, General Services Administration; WILLIAM J. USERY, JR., Secretary of Labor, United States Department of Labor; LAWRENCE Z. LORBER, Director, Office of Federal Contract Compliance Programs, United States Department of Labor,
Defendants.

Civil Action
No. 76 C 2444

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter coming for hearing on August 6, 1976 on the motion of Sears, Roebuck and Co. for a preliminary injunction pursuant to Rule 65(a), and the Court having heard the evidence and testimony of the parties and the arguments of counsel, hereby finds as follows:

FINDINGS OF FACT

1. Plaintiff, Sears, Roebuck and Co. ("Sears"), a New York corporation with principal corporate offices located in Chicago, Illinois, is engaged, *inter alia,* in the sale and distribution of merchandise throughout the United States. A portion of plaintiff's business consists of contracts or subcontracts with agencies of the United States Government and Sears complies, therefore, with Executive Orders 11246 and 11375, 30 C. F. R. 12319 and 14303 ("the Executive Orders"), and the regulations promulgated thereunder, Title 41, Chapter 60, Part 60-3, of the Code of Federal Regulations, 41 C. F. R. 60 ("Revised Order 4"), governing the submission by government contractors of equal employment opportunity reports and information, under penalty of cancellation of existing government contracts and debarrment from future contracts, to the Department of Labor, Office of Federal Contract Compliance ("OFCC") and its various Compliance Agencies.

2. Defendant GSA is an executive agency of the Federal Government and Sears' Compliance Agency under the Executive Orders and Revised Orders 4 and 14. Defendants Jack Eckerd, E. E. Mitchell and Willie O. Green, occupy the positions of Administrator, Director of Contract Compliance Programs, and Chicago Field Director of Contract Compliance, respectively, of GSA. Defendant Lawrence Z. Lorber is the Director of the OFCC and Defendant William J. Usery, Jr. is the Secretary of Labor of the United States Department of Labor. Defendant Willie O. Green, as Chicago Field Director of Contract Compliance, GSA has an office located in Chicago, Illinois.

3. Pursuant to the Executive Orders and Revised Order 4, Plaintiff has been required to develop and maintain Standard Form 100 ("EEO-1's") or its equivalent, and affirmative action programs ("AAP's") for both its entire corporate domestic

operations and for each of its individual domestic establishments. Plaintiff has also, pursuant to Revised Order 4, been subject to compliance reviews at its various domestic establishments and has been required to submit AAP's, EEO-1's and compliance support data in connection therewith. Plaintiff has also submitted other documents and information to GSA and has permitted off-site inspection of documents and the removal of data, apart from documents required to be so inspected and removed under Revised Order 14, in order to demonstrate its compliance with the Executive Orders and Revised Order 4.

4. As of February 2, 1973, Defendant Usery's predecessor issued new Rules, published as Title 41, Chapter 60, Part 60-40, of the Code of Federal Regulations, 41 C. F. R. 60-40.1 *et seq.* ("Disclosure Rules"), regulating the disclosure to the public of documents in the custody of the OFCC and its Compliance Agencies. The Disclosure Rules provide that various documents, including EEO-1's and AAP's, which have been obtained by said Agencies pursuant to the Executive Orders and Revised Order 4, shall be disclosed, with exceptions, to any persons requesting same.

5. By letter dated January 20, 1976, Charles W. Dahm, O. P., a Chicago clergyman representing a religious order owning stock in Sears, requested that GSA supply him with the EEO-1 form, Affirmative Action Plan and supporting documents submitted for Sears' Tower headquarters facility in Chicago, Illinois for the year 1974.

6. By letters of February 19, 1976 and March 5, 1976, GSA informed Sears of Father Dahm's request and that it intended to honor this request and furnish this information to Mr. Dahm.

7. On or about February 25, 1976 Sears' representatives met with Father Dahm and, consistent with Sears' general disclosure policy, provided him with cumulative national and Chicago area statistical information concerning the racial and

sexual composition of Sears' workforce. Sears declined, however, to provide him with Sears Tower headquarters data alone. Father Dahm refused, therefore, to withdraw his FOIA request for the Sears' headquarters data.

8. The AAP, EEO-1 data and other documents proposed to be disclosed to Father Dahm had been provided to GSA by Sears in June, 1974, pursuant to a compliance investigation conducted by GSA's Chicago Field Contract Compliance Office, now headed by Defendant Green. That investigation had been prompted by a complaint from WE concerning Sears' affirmative action commitment for its national headquarters facility. Said information and documentation including, *inter alia*, the Goals and Timetables Progress Report and 1973 and 1974 EEO-1 data, was provided to Mr. E. M. Hammes, GSA's investigator upon his express assurance that the data would be retained in strictest confidence by GSA and would not be publicly disclosed. Based on Mr. Hammes' assurances of confidentiality, Sears permitted him to have access to this confidential data, and to duplicate it and remove it from Sears' premises. This data is the data which GSA now proposes to disclose to Mr. Dahm.

9. On March 29, 1976, pursuant to 41 C. F. R. 60-60.4(d), Sears submitted written objections to GSA's proposed disclosure claiming, *inter alia*, that disclosure is prohibited under 18 U. S. C. § 1905 because it "concerns or relates to . . . [Sears] confidential statistical data" and is, therefore, exempt from disclosure under section (b)(3) of the Freedom of Information Act ("FOIA") [5 U. S. C. § 552 *et. seq.*] Sears alternatively claimed that the information was also exempt from mandatory disclosure under (b)(4), (b)(6) and (7) of the FOIA and that disclosure in the circumstances of this case would constitute an abuse of GSA's discretion.

10. Sears' objections were rejected by Defendant Mitchell on April 27, 1976 and thereafter by Defendant Lorber in a ruling issued on June 24, 1976. Sears was thereupon advised

that the data would be released on or after July 8, 1976, unless judicially restrained.

11. The disputed data consists primarily of a statistical and numeral breakdown by race and sex of Sears Tower headquarters workforce within a number of different job classifications and categories for the calendar year 1974. Sears classifies this information as confidential internally within the Company and, excepting those members of Sears' staff responsible for the formulation and implementation of its affirmative action program, its individual facility data is not made available to Sears employees, its competitors or the general public. The only public release of Sears data is on a cumulative national or regional basis where Sears has been satisfied that there will be no significant injury to its goodwill or competitive interests.

12. On July 2, 1976, Plaintiff filed with this Court its Verified Complaint for Declaratory Judgment and Injunction and a Motion for Temporary Restraining Order. On July 6, this Court granted said motion requiring the preservation of the status quo. Said order was thereafter extended pending a hearing on Plaintiff's motion for Preliminary Injunction. Throughout this proceeding Defendants have indicated that, unless they are enjoined by the Court from disclosing these documents, they will not delay disclosure pending a resolution by the Court on the merits of the Complaint.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under 18 U. S. C. § 1905; 28 U. S. C. § 1331; 28 U. S. C. § 1337; the Administrative Procedure Act, 5 U. S. C. § 701, *et. seq.;* the Freedom of Information Act, 5 U. S. C. § 552 (hereafter the "FOIA"); and the Federal Declaratory Act, as amended, 28 U. S. C. §§ 2201-03.

2. Venue lies in this Court under § 1391(e) since: (a) Sears is a resident of this judicial district; (b) Sears' headquarters data, which is the subject of this dispute is within this district as is the requester of this information, Charles W. Dahm, O.P.; and (c) the data in issue was submitted to a representative of Defendant Green's Chicago office within this district which has the primary responsibility for ensuring compliance with the applicable Executive Orders.

3. Unless Defendants are enjoined from disclosing this data, Plaintiff will suffer immediate and irreparable injury for which there is no adequate remedy at law. Moreover, once said documents are disclosed, the out-of-date and incomplete information contained therein might well become the basis for protests, picketing or boycotts directed at its Tower headquarters facility resulting in irreparable damage both economically and in terms of its present and future public relations.

4. Neither Defendants nor the requester, Father Dahm or his organization will be subjected to material prejudice by grant of this preliminary injunction inasmuch as the data is out-of-date and the national and Chicago area data voluntarily provided by Sears should be sufficient to assess Sears' equal employment commitment and progress.

5. The data which GSA proposes to disclose constitutes confidential statistical data or is directly related or concerned therewith and GSA is, therefore, specifically prohibited from disclosing such information by 18 U. S. C. § 1905. I find, therefore, that there is a reasonable probability that Sears will succeed on the merits of its claim that the information herein is exempt from disclosure under Exemption (b)(3) of the FOIA and that GSA's disclosure of such data would constitute an unauthorized and arbitrary and unlawful exercise of its powers.

6. Defendants have not requested a bond and the Court finds, under the circumstances of this case, that no bond is necessary or required.

WHEREFORE, it is hereby Ordered, Adjudged and Decreed that:

1. Defendants, and each of them, and their successors in office, agents, servants, and employees, and all other persons in active concert or participation with them, are restrained and enjoined from disclosing the documents provided to them by Sears and in issue in this suit and any related materials or documents, to either Mr. Dahm or any other member of the public.

2. Defendants, and each of them, and their successors in office, agents, servants, employees, and all persons in active concert or participation with them, are restrained and enjoined from violating the provisions of 18 U. S. C. § 1905, and from disregarding the applicable exemption of the Freedom of Information Act [5 U. S. C. § 552(b)(3)].

3. Pending a final decision on the merits of Plaintiff's Complaint, the defendants are restrained and enjoined from publicly disclosing any of the "Goals and Timetables" and/or EEO-1 forms or their equivalent which have been submitted to them by Sears pursuant to the Executive Orders and any other relevant statutes and regulations, and from in any manner publicly disclosing any like or related materials or documents.

Enter: August 27, 1976.

/s/ FRANK J. McGARR
U. S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 1, 1978.

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge**

SEARS, ROEBUCK AND CO.,
Plaintiff-Appellee,

No. 77-1417 *vs.*

JACK ECKERD, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-C-2444

Frank J. McGarr, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellee Sears, Roebuck and Co. and the answer thereto, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, hereby Denied.

* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 9, 1978.

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

SEARS, ROEBUCK & COMPANY, *Plaintiff-Appellee,* CHARLES W. DAHM, O. P., *Intervenor-Plaintiff-Appellant,* No. 77-1417 *vs.* JACK ECKERD, Administrator, General Services Administration, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76-C-2444 Frank J. McGarr, Judge.

This matter comes before the court for its consideration upon the filing herein of the following documents:

1. The "MOTION FOR STAY OR ISSUANCE OF MANDATE PENDING PETITION FOR CERTIORARI" filed herein on June 5, 1978 by counsel for the plaintiff-appellee.

2. The "CORRECTED AND AMENDED MOTION FOR STAY OF ISSUANCE OF MANDATE PENDING

PETITION FOR CERTIORARI" filed herein on June 6, 1978 by counsel for the plaintiff-appellee.

On consideration thereof,

IT IS ORDERED that plaintiff-appellee's corrected motion for stay of mandate is hereby, Granted. The mandate of this court is hereby, Stayed to and including July 7, 1978.

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 3, 1978.

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

SEARS, ROEBUCK & COMPANY, *Plaintiff-Appellee,* CHARLES W. DAHM, O. P., *Intervenor-Plaintiff-Appellant,* No. 77-1417 *vs.* JACK ECKERD, Administrator, General Services Administration, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76-C-2444 Frank J. McGarr, Judge.

This matter comes before the court on the "MOTION TO EXTEND STAY OF MANDATE PENDING FILING OF APPELLEES PETITION FOR A WRIT OF CERTIORARI" filed herein on June 29, 1978 by counsel for the plaintiff-appellee. On consideration thereof,

IT IS ORDERED that said motion be, and the same is hereby, Granted. The mandate of this court is hereby Stayed to and including July 17, 1978, in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX G

The relevant portions of the exemptions to the Freedom of Information Act are as follows:

5 U. S. C. § 552(b).

(b) This section does not apply to matters that are—

(3) specifically exempted from disclosure by statute (other than Section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld;

APPENDIX H

18 U. S. C. § 1905 provides as follows:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association, or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. (June 25, 1948, ch. 645, 62 Stat. 791.)

APPENDIX I

5 U. S. C. § 301 provides as follows:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.
>
> Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 379.

APPENDIX J

The relevant portions of 41 C. F. R. Part 60-40 are as follows:

Sec. 60-40.2. Information Available on Request.—(a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U. S. C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contact compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCC or Compliance Agencies must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCC or the Compliance Agencies except as limited in 41 CFR 60-40.3(a)(1).

(2) Imposed plans and hometown plans, pending or approved.

(3) Text of final conciliation agreements.

(4) Validation studies of tests or other preemployment selection methods.

(5) Dates and times of scheduled compliance reviews.

Sec. 60-40.3. Information Exempt from Compulsory Disclosure and Which May Be Withheld.—(a) The follow-

ing documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers if such disclosure would subject the named compliance officers to undue harassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Thereafter, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

(b) Other records may be withheld consistent with the Freedom of Information Act on a case-by-case basis, with the prior approval of the Director, OFCC.

Sec. 60-40.4. Information Disclosure of Which Is Prohibited by Law.—The Standard Form 100(EEO-1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709(e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

APPENDIX K

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U. S. App. D. C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 77-1822

SEARS, ROEBUCK AND COMPANY,

Appellant,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

No. 77-1995

SEARS, ROEBUCK AND COMPANY

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Appellants.

No. 77-1996

SEARS, ROEBUCK AND COMPANY

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Appellants.

Appeals from the United States District Court
for the District of Columbia
(D. C. Civil Nos. 77-0393 and 77-0924)

Argued March 31, 1978
Decided June 9, 1978

S. Richard Pincus, for appellant in No. 77-1822 and cross appellee in Nos. 77-1995 and 77-1996.

Ramon V. Gomez, Attorney, Equal Employment Opportunity Commission, with whom *Beatrice Rosenberg,* Assistant General Counsel, and *Raj K. Gupta,* Attorney, Equal Employment Opportunity Commission, were on the brief, for appellee in No. 77-1822 and cross appellants in Nos. 77-1995 and 77-1996.

Barbara Kaye Besser, Margaret Beller and *Charlotte Hallam* were on the brief, for intervenor in No. 77-1822.

Robert E. Williams and *Frank C. Morris, Jr.* were on the brief, for *Amicus Curiae,* The Equal Employment Advisory Council, urging reversal.

Victor H. Kramer, Charles E. Hill and *Douglas L. Parker* were on the brief, for Amicus Curiae, Institute for Public Interest Representation, urging affirmance of the District Court's holding that the provisions of 18 U.S.C. § 1905 are inapplicable to disclosures of information required by Title VII of the Civil Rights Act of 1964.

Before LUMBARD,* *Senior Circuit Judge* for the Second Circuit, and MACKINNON and WILKEY, *Circuit Judges.*

Opinion for the court filed by *Senior Circuit Judge* LUMBARD.

LUMBARD, *Senior Circuit Judge*:

In these appeals we address the question whether the Equal Employment Opportunity Commission (EEOC) may furnish to employees proceeding as private litigants under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to § 2000e-17, information regarding employers whom the EEOC is investigating. The district court ruled that the EEOC could give to certain individual employees data accumulated pursuant to the EEOC's investigatory powers; the court also ruled, however, that the Commission is statutorily prohibited from giving to such employees information obtained by the EEOC during settlement negotiations with employers.

Sears, Roebuck & Co. (Sears), a nationwide retailer, appeals from the judgment of the district court insofar as it allowed the EEOC to give some information in its files concerning Sears to employees who have brought suit against Sears. The EEOC cross appeals from so much of the judgment as forbad release of information obtained during its negotiations with Sears. Finding that Title VII's prohibition on "making public" information secured by the EEOC during its investigations extends to any disclosure to persons outside the government, we reverse that part of the district court's judgment that allowed the EEOC to give employees of Sears data from EEOC files concerning Sears; in all other respects we affirm the judgment of the district court.

I. FACTS

A motivating factor behind the Civil Rights Act of 1964 was Congress' concern over discrimination in employment as a cause of unemployment of minority members of the work

* Sitting by designation pursuant to 28 U. S. C. § 294(d).

force. *See* Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968). Thus, as part of the Act, Congress enacted Title VII, 42 U.S.C. § 2000e-1 to § 2000e-17, which makes illegal certain "unfair employment practices" of employers, including the refusal to hire or the discharge of ". . . any individual . . . because of the individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

To facilitate compliance with Title VII's strictures, Congress created the EEOC; primary enforcement power was left to aggrieved employees, however. Many observers saw piecemeal enforcement by individuals to be an inadequate device for achieving the national goals of Title VII, *see* Sape & Hart, *Title VI Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972), and so in 1972 Congress amended the statute to give the EEOC broad authority to bring enforcement actions in federal court, should negotiations fail to result in comprehensive settlements of Title VII violations by employers. *See* 42 U.S.C. § 2000e-5(b), (f)(1); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); H. Friendly, Federal Jurisdiction: A General View 82-87 (1972). Indeed, to ensure that Title VII violations would be remedied whenever possible through a conciliation agreement reaching all employees of a given employer, Congress prohibited individual employees from bringing suit on their own behalf until after the EEOC has had an opportunity to investigate and settle charges of employment discrimination with the employer. *See* 42 U.S.C. § 2000e-5; *cf. Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 272 (4th Cir. 1976). Thus, Title VII provides that once a charge of an unfair employment practice is filed with the EEOC by either a private party or a commissioner, the Commission must investigate the charge to determine whether there is reasonable cause to believe that the employer has engaged in illegal employment discrimination. If the EEOC finds reasonable cause to believe there has been a violation of Title VII, it must enter into conciliation discussions with the

employer in an attempt to remedy the situation.[1] If these discussions fail, the EEOC may file suit against the employer in the district court. Furthermore, parties aggrieved by alleged Title VII violations may bring suit in federal court 180 days after filing charges with the EEOC, whether or not the EEOC has acted within that time.

To enable the EEOC to carry out its statutory role of negotiating settlements with employers, Congress gave the Commission authority to obtain certain information from employers against whom employment discrimination charges have been filed, and to enter into discussions with employers concerning such charges. The two statutory provisions at issue here, §§ 706(b) and 709(e) of Title VII, prohibit the EEOC from "making public" any information the EEOC receives as a result of its negotiations with employers or its request for information from employers.

On August 30, 1973, then-EEOC Chairman William H. Brown, III, acting under 42 U.S.C. § 2000e-5(b), filed with the Commission a charge against Sears, claiming that the company had engaged in unfair employment practices. Specifically, Brown alleged that Sears had discriminated against job applicants and employees across the nation on the basis of their race, sex, and national origin.

The Commission consolidated with Commissioner Brown's national charge the several hundred pending charges that had been filed by private individuals and organizations in various parts of the country regarding numerous instances of alleged employment discrimination by Sears.[2] This consolidation of

1. If the EEOC determines that there is no reasonable cause supporting the charge, the private party who filed the charge (or on whose behalf the charge was filed, in the case of a commissioner charge) may, within 90 days after receiving notice of the EEOC's decision, bring a lawsuit in federal court against the employer. *See* 42 U. S. C. § 2000e-5(f)(1).

2. The precise number and nature of these charge are before us only in the sealed record on appeal and, like the details of Brown's charge, are not for public dissemination. *See* 42 U. S. C. § 2000e-5(b).

complaints is consistent with the policy of the Commission to proceed against nationwide employers, whenever possible, by use of commissioners' complaints that potentially cover all those injured by the employers' alleged discriminatory hiring activities.

The consolidated EEOC proceeding against Sears was referred to the Commission's National Programs Division, now known as the Special Investigations and Conciliation Division, which requested, pursuant to 42 U.S.C. § 2000e-8(a), information from Sears concerning the company's hiring policies and activities. The information provided by Sears, dating in some instances from 1964, pertained to the operation of 168 of Sears' approximately 3,800 retail facilities, and revealed the sexual, racial, and ethnic makeup of approximately 30% of Sears' work-force in various job categories, both hourly and salaried. Sears also gave data to the EEOC concerning recruitment, selection, evaluation, promotion, transfer, training, and compensation of Sears' employees, and details of the company's attempts to hire women and members of minority groups. Much of the data given to the EEOC had never been given out publicly by Sears.

Although Title VII expressly requires conciliation discussions between the EEOC and an employer against whom charges have been filed only after the Commission has determined there is reasonable cause to believe that the employer has engaged in unfair employment practices, *see* 42 U.S.C. § 2000e-5(b), it appears that the Commission regularly engages in discussions (known as "pre-determination settlement discussions") prior to making such a determination, see 29 C.F.R. § 1601.19a (1977); this was done in the proceeding against Sears. Thus, on November 11, 1975, the EEOC began settlement discussions with Sears. As part of the offer and counteroffers made during some ten months of negotiations, Sears compiled and gave to the EEOC detailed statistical studies covering all of its approximately 420,000 employees.[3] The information concerning Sears'

3. *See* Sears, Roebuck & Co., Annual Report, 14 (1975).

numerous employment tasks was organized into seven "Affirmative Action Job Categories," in an attempt to define the present status of Sears' equal employment endeavors, to establish specific goals for the employer, and to devise the basis for an agreement regarding back pay. It is undisputed that, but for its attempts to reach an agreement with the EEOC, Sears would not have compiled these statistical analyses. Also as part of its negotiations with the Commission, Sears continued to supply up-to-date information concerning the company's affirmative action program.

On May 21, 1975, more than six months after the inception of the Sears settlement discussions, the Commission promulgated regulations specifying that "charging parties" (that is, private parties who have filed charges with the EEOC pursuant to 42 U.S.C. § 2000e-5(b)) and certain others alleged to be aggrieved by Title VII violations being investigated by the EEOC may be given EEOC investigative file data. *See* Section 83.5 of the EEOC Internal Compliance Manual. *See also* 29 C.F.R. § 1610.17(d) (1977). Thereafter, on March 12, 1976, the attorney representing two charging parties, Carolyn Hendrock and Donna Walker, requested that the EEOC turn over information pertaining to her clients which was contained in the consolidated EEOC Sears file. Some of the data sought had been obtained in response to EEOC investigative requests directed to Sears; other data were part of the statistical analyses that had been prepared by Sears and given to the EEOC during the course of settlement discussions. At the time of their request, Hendrock and Walker informed the EEOC that they intended to file a Title VII action against Sears on behalf of a class of employees, and that they were eligible to do so, as 180 days had passed since the filing of their charges with the EEOC.

On June 2, 1976, the Commission advised Sears of its intention to honor the requests for investigative file information concerning Sears. On August 12, 1976, after having obtained a postponement of the time for distribution of the file data, Sears

filed suit in the Northern District of Illinois, seeking a declaratory judgment and an injunction prohibiting the Commission from disseminating the information requested. On March 4, 1977, the case was transferred to the District of Columbia on the motion of the EEOC, and Hendrock and Walker intervened as defendants on April 7, 1977. Since the initial request for material from the Sears EEOC file, several other attorneys, representing both individuals and classes, have made similar demands for information pertinent to their clients. Presently there are at least four private Title VII actions pending against Sears. Moreover, there are at present 343 private charges pending before the EEOC against Sears, all of which could ripen into lawsuits.

On April 19, 1977, having failed to reach agreement with Sears on a plan to remedy the alleged Title VII violations, the EEOC issued decision 77-21, finding that there was reasonable cause to believe that Sears had engaged in unfair employment practices. The 250-page decision included detailed analyses of much of the data given to the Commission by Sears during the investigation and settlement discussions. The EEOC then sent "Letters of Determination" to some private charging parties. These letters notified the employees of the EEOC's finding of reasonable cause, gave details of the factual basis for that finding, and stated that the complete Commission decision would soon be sent to them.

Sears, upon learning of the Letters of Determination and their promise of further disclosure, filed a second suit in the District of Columbia on June 1, 1977, seeking an injunction against distribution of investigative file data in the form of the letters or the decision. After enjoining *pendente lite* all dissemination of EEOC material concerning Sears, the district court held a hearing on the sole factual issue in dispute (whether the Commission had promised Sears' attorneys it would hold confidential all information received during settlement discussions), and issued a single decision covering both of the Sears actions.

Largely relying on the Fifth Circuit's decision in *H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147 (5th Cir.) (*en banc*), *cert. denied*, 412 U.S. 939 (1973), the district court ruled that the EEOC was not prohibited by § 709(e) of Title VII, 42 U.S.C. § 2000e-8(e), from giving out file information to charging parties, provided that the information had been obtained by the EEOC under its investigatory powers, *see* 42 U.S.C. § 2000e-8 (a), rather than as a part of settlement discussions with the employer under investigation. *See Sears, Roebuck & Co.* v. *EEOC*, 435 F.Supp. 751 (D.D.C. 1977). However, the district court, relying upon the policy supporting out-of-court settlements of Title VII disputes, ruled that information obtained by the Commission during settlement discussions cannot be disclosed to charging parties who request it, although the court recognized that "the appeal of symmetry" suggests that the prohibition of § 706(b) of Title VII has a scope similar to that of § 709(e). The district court also found that the EEOC had promised Sears that it would not disclose to anyone the information given to the Commission during settlement discussions. Last, the court found that, because EEOC decision 77-21 inextricably commingled material obtained by request of the EEOC with material obtained during settlement discussions, the decision could not be distributed to charging parties; and that Letters of Determination may include only a simple notification of the fact of the Commission's finding of reasonable cause.[4]

From this judgment of the district court both sides appeal. Sears appeals from that part of the judgment that allows the EEOC to give to charging parties information obtained through investigative demand. The Commission appeals from the judgment insofar as it precludes dissemination of factual data gleaned from settlement discussions and restricts notice to charging parties of the EEOC finding of reasonable cause.

4. Following the judgment of the district court, Sears sought a stay, both in this court and in the Supreme Court. These requests were denied. After oral argument, Sears again requested a stay, pending our decision. We granted this request by order of April 14, 1978.

II. Discussion

A. § 709(e)—Investigation Material

§ 709(e) of Title VII provides in relevant part that

> [i]t shall be unlawful for any officer or employee of the Commission *to make public in any matter whatever* any information obtained by the Commission pursuant to its [investigative] authority . . . prior to the institution of any proceeding under this subchapter involving such information. 42 U.S.C. § 2000e-8(e). (emphasis supplied)

The Commission argues that the crucial phrase in this provision, "to make public in any matter whatever," refers only to dissemination to members of the public other than charging parties. We disagree. We hold that by enacting § 709(e), Congress meant to prohibit the EEOC from giving information from its investigative files to any individual outside the government.[5]

An examination of the overall statutory scheme persuades us that Title VII was never meant to permit dissemination of EEOC investigative data to anyone not within the government. As we have noted, Congress, after seeing the inadequate results of relying on private actions for securing compliance with Title VII, settled upon comprehensive settlements negotiated by the EEOC as the primary mechanism to achieve the broad objectives of the Act. Through such agreements, compliance with the requirements of Title VII may be achieved with respect to *all* employees of a given company, rather than merely for those few who might happen to file charges and later bring private actions.

The EEOC, as enjoined by Congress, has adopted a policy favoring the consolidation of all charges against an employer, and negotiations concerning the employer's overall employment practices.[6] It would do violence to this scheme of negotiation

5. To the extent that EEOC regulations conflict with our ruling, those regulations are invalid as contrary to the terms of Title VII.

6. It appears that the EEOC has met wtih some degree of success in negotiating settlements with large employers accused of Title VII violations. *See* EEOC, 10th Annual Report, Lab. L. Rep. (CCH), No. 22, at 8 (July 8, 1977).

and settlement if the Commission were permitted to encourage numerous private litigants by distributing information from EEOC files before the administrative procedures of Title VII had run their course.

The facts of the instant case illustrate the extent to which EEOC efforts to achieve an agreement with respect to nationwide employment practices may be undermined should the Commission be allowed to disseminate vast amounts of data to hundreds of charging parties. After nearly four years, the Commission has concluded its detailed investigation of Sears; extensive informal settlement discussions have been held already. Now that the EEOC has issued its formal determination of reasonable cause, the conciliation process mandated by the statute is to begin. Affording the charging parties virtually unlimited, free discovery by opening the EEOC files at this point would have the effect, as the district court stated, of "fueling private lawsuits," *Sears, Roebuck & Co.* v. *EEOC*, 435 F.Supp. 751, 757 (D.D.C. 1977), and might thereby interfere substantially with the ongoing process of conciliation between the EEOC and Sears. Rather than focusing upon an immediate agreement that would result in the correction of Sears' employment policies as they pertain to the several hundred thousand people who currently work for Sears and the many thousands who apply to the retailer each year for employment, the EEOC and Sears would be forced to direct their attention toward the claims of a mere 343 individual employees whose lawsuits would be fueled by the EEOC information. In this way, the overriding public interest in the elimination of employment discrimination throughout Sears' facilities across the country would be subordinated to some extent to the interests of a few individual employees.

Moreover, Title VII provides no effective means to limit distribution of investigatory material to charging parties alone. Although the Commission extracted promises from requesting parties with respect to some of the information it proposed to distribtue in the instant case, such promises obviously are not enforceable against those receiving information. At oral argument, counsel for the Commission asserted that the EEOC or employees could seek to enjoin parties from violating their agreement with the Commission. When pressed, however, counsel could point to no instance when this had been done. More important, injunctive relief would give little protection to employers once information given to charging parties had appeared in the news media, or otherwise had been distributed to the public at large. As there is nothing to prevent charging parties from redistributing what they receive from the EEOC to whomever they please, distribution of investigative file data to charging parties would be tantamount to distribution to the public at large.

If EEOC files were open to charging parties, employers, realizing the lack of any effective mechanism within the EEOC for restricting the use of information once it leaves the hands of the EEOC, in many cases would refuse to comply voluntarily with investigative demands by the EEOC under § 709(e), thereby forcing the Commission to use subpoena power and suit in the district court in place of amicable negotiations. By doing so, employers would at least have the opportunity to persuade a court to impose effective restrictions on the scope of distribution—something which is beyond the power of the EEOC to do. Thus, if the statute were construed to allow distribution of investigatory data to individuals outside the government, the operation of the voluntary investigatory proceedings established by § 709(e) would be impeded in a fashion plainly not intended by Congress when it enacted the restriction on "making public" data gathered by the Commission.

Although the legislative history is sparse, we believe that Congress' intention in enacting § 709(e), viewed in light of the well-established practice throughout the government, was to forbid disclosure of sensitive data to any persons outside the government. Government agencies, such as the Department of Justice and the National Labor Relations Board, do not give to private litigants information the government has accumulated concerning parties it is investigating, absent some express statu-

tory authorization or requirement to do so." *See, e.g., Consumers Union of United States, Inc.* v. *Saxbe,* [1974] Trade Cases (CCH) ¶ 75,057, at 96,759 (D.D.C. 1974). Indeed, Congress itself has placed strict constraints upon what information the government may disclose with respect to certain sensitive governmental functions, such as investigations. *See, e.g.,* 18 U.S.C. § 1905; Int. Rev. Code of 1954, § 7213. In doing so, Congress has no doubt been motivated by its concern that critical government activities may be impaired by excessive disclosure. *See Charles River Park "A," Inc.* v. *HUD,* 519 F.2d 935, 940 (D.C. Cir. 1975); *National Parks & Conservation Ass'n* v. *Morton,* 498 F.2d 765, 767 (D.C. Cir. 1974). Plainly these limitations on disclosure by agents of the Executive Branch (whether imposed by an agency upon itself or imposed by Congress) were meant to draw the line against giving information to those outside of the government. Thus, there is reason to believe that Congress in enacting § 709(e) had in mind the common prohibition against giving investigatory information to individuals outside the government.

The result we reach is not necessarily inconsistent with that reached by the Fifth Circuit in *H. Kessler & Co.* v. *EEOC,* 472 F.2d 1147 (5th Cir.) (*en banc*), *cert. denied,* 412 U.S. 939 (1973). In that case Judge Tuttle, speaking for the majority, ruled that the Commission could give to a charging party information from the individual's investigative file. *Kessler,* however, involved a single charge against an employer by one individual. There was no national, consolidated file, as in the instant case, and accordingly the investigatory material available was much more limited than it is here.[8] Further, distribution in *Kessler* was

7. The Freedom of Information Act, 5 U. S. C. § 552 (1976), provides just such explicit authorization, absent overriding statutory prohibition. *See* 5 U. S. C. § 552(b)(3) (1976); *Project: Government Information and the Rights of Citizens,* 73 MICH. L. REV. 971, 1055 (1975).

8. Indeed, the court in *Kessler* emphasized that it was "dealing . . . with a very limited form of disclosure . . ." 472 F. 2d 1147, 1149 (5th Cir. 1973) (*en banc*).

restricted to a single person, whereas here the EEOC is asking, as the trial court observed at the hearing on July 14, 1977, to be allowed to give information virtually to "anybody [it] want[s]."

To the extent that any language in *Kessler* may be inconsistent with our holding here, we decline to follow *Kessler,* as we believe that the statute gives the private Title VII litigant adequate means of prosecuting the litigation.[9] Thus, 42 U.S.C. § 2000e-5(f)(1) empowers federal courts to appoint an attorney for a Title VII litigant and to "authorize commencement of the action without the payment of fees, costs, or security." Most important, under 42 U.S.C. § 2000e-5(k) the courts may "allow the prevailing party [in a Title VII action] . . . a reasonable attorney's fee as part of the costs." Thus, to the extent that an employer unreasonably impedes discovery in private litigation under Title VII, he risks increasing his own liability, inasmuch as he increases the attorney's fee of the plaintiff.

Finally, it is significant that one of the court's primary concerns in *Kessler,* the short time within which a litigant must bring suit after receiving notice that the EEOC (or the Attorney General in cases involving a governmental agency, *see* 42 U.S.C. § 2000e-5(f)(1)) has neither filed suit nor reached a conciliation, is no longer apposite: In 1972 Congress increased this time period from 30 to 90 days.[10]

9. We do not concur in the inference drawn by the court in *Kessler* from the 1972 deletion in Conference without comment of an amendment to § 709(e) that would have expressly limited distribution of EEOC investigatory material to those within the government. The Conference's action may well have resulted from the feeling that the amendment was unnecessary, as it merely restated Congress' understanding of § 709(e) as it now stands.

Furthermore, we note that § 706(a) (now § 706(b), 42 U. S. C. § 2000e-5(b)), as applied by the court in *Kessler,* required the "consent of the parties" prior to dissemination of negotiation data. The statute, as amended in 1972, now requires the "consent of the *persons concerned*" (emphasis supplied).

10. Although the *Kessler* opinion was filed more than nine months after the 1972 amendments to Title VII took effect, the court's opinion took no notice of the amendments.

Thus, we are not persuaded that aggrieved employees are unduly hindered in commencing suit within the required time unless they are given ready access to the investigatory files of the EEOC.

B. § 706(b)—Settlement Negotiation Material

§ 706(b) of Title VII provides in relevant part that

> [n]othing said or done during and as a part of . . . informal endeavors [at conciliation] *may be made public* by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. 42 U.S.C. § 2000e-5(b) (emphasis supplied).

Having concluded that under 709(e) the EEOC cannot give out information to any parties outside the government, we hold that § 706(b) imposes a similar restriction on the EEOC.

The use of the same language in § 709(e) and § 706(b) indicates that it should be given the same meaning in both sections unless there is some reason to do otherwise. We find no reason to construe the language in § 706(b) differently from our construction of § 709(e). On the contrary, there are compelling policy reasons for not allowing the EEOC to give, even to charging parties, information gleaned from settlement negotiations: Only by keeping such data strictly confidential can employers be encouraged to discuss openly and frankly the possible grounds for an amicable resolution of the disputes at hand. As the trial judge perceptively stated, "[k]nowledge that anything 'said or done' by way of settlement with EEOC will be disclosed to potential litigants is bound to dissuade candor and even participation by employers in a negotiated settlement" (footnote omitted). *Sears, Roebuck & Co.* v. *EEOC,* 435 F.Supp. 751, 759 (D.D.C. 1977).

We consider the scope of permissible disclosure under § 709(e) to be as narrow as that under § 706(b), and thereby

protect the important policy of encouraging settlement by negotiation while at the same time recognizing the symmetry of these two provisions as drafted by Congress. Accordingly, we hold that, as with investigative data, information obtained by the EEOC during settlement discussions with employers cannot be disclosed to anyone outside the government.[11]

Affirmed in part, reversed in part.

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11. Our conclusion is further buttressed by the EEOC's own actions in repeatedly assuring Sears' negotiating representative that anything given to the Commission during negotiations would be held confidential. *See* Sears, Roebuck Co. v. EEOC, 435 F. Supp. 751, 760 (D. D. C. 1977). We believe, as the Commission itself indicates in its brief on appeal, that these assurances merely reflected what representatives of the EEOC believed to be required by § 706(b); we disagree with the Commission, however, concerning what "confidential" means.

We need not address the question whether information received by the Commission during settlement negotiations may be used as evidence in future proceedings instituted by the EEOC against Sears. We note, however, that any material given to the EEOC by Sears that the Commission could have obtained through the investigative mechanism of § 709(a) might well be immune from the § 706(b) restriction on use at trial.

Moreover, because we find that both investigative and negotiation data may not be disclosed to charging parties, we need not address the question whether it is possible to separate the two as they appear in the Commission's written decision supporting its determination of reasonable cause or in the Letters of Determination. Anything more than a mere summary statement of the EEOC's finding would necessarily rely on either investigatory or negotiation data and therefore, as Judge Gesell ordered, cannot be distributed to persons outside the government.

Of course, nothing in our decision affects the EEOC's authority to give out investigatory information after it has initiated suit. *See* 42 U. S. C. § 2000e-8(e):

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v.

CHARLES W. DAHM, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. As a government contractor, petitioner is required to comply with the federal equal employment opportunity policies set forth in Executive Order 11246, 30 Fed. Reg. 12319, as amended, 32 Fed. Reg. 14303. Department of Labor regulations promulgated under the authority of the Executive Order require that petitioner prepare and submit to the General Services Administration certain materials documenting its equal employment activities and goals.[1] Among the documents petitioner is required to prepare are Affirmative Action Programs for each of its domestic establishments. 41 C.F.R. Part 60 (1976).

[1]The Executive Order provides that the Secretary of Labor is to enforce the terms of the Order. The Secretary has delegated the enforcement authority to the Office of Federal Contract Compliance Programs (OFCCP). 41 C.F.R. 60-1.2 (1976). The OFCCP in turn has

In early 1976 GSA informed petitioner that a request had been made for copies of petitioner's 1974 Affirmative Action Programs for its corporate headquarters in Chicago. Petitioner objected to any disclosure of the materials. GSA overruled the objections, however, and the decision to disclose was upheld by the Director of the OFCCP (Pet. App. A4-A5).

Petitioner then filed suit in the United States District Court for the Northern District of Illinois; it asked the court to block the release of the materials, alleging that the materials contain confidential business information and that their release would violate the Trade Secrets Act, 18 U.S.C. 1905.[2] Petitioner further argued that the materials are exempt from mandatory disclosure under Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3).

The district court entered a preliminary injunction barring the release of the materials (Pet. App. A16-A22). The court held that the materials contain confidential statistical data and that the release of those materials would violate the Trade Secrets Act (Pet. App. A21).[3]

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designated various agencies as "compliance agencies" to monitor the equal employment activities of different government contractors. 41 C.F.R. 60-1.6. GSA serves as petitioner's compliance agency.

[2]Petitioner also relied on various other statutes, including Section 709(e) of the Civil Rights Act of 1964, 78 Stat. 262, 42 U.S.C. 2000e-8(e), and Exemptions 4, 6, and 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), (6) and (7) (Pet. App. A5). Petitioner did not press these points on appeal and does not rely on them here.

[3]In the course of holding that the proposed disclosure would violate the Trade Secrets Act, the court held that the materials are exempt from disclosure under Exemption 3 of the Freedom of Information Act (Pet. App. A21).

The court of appeals vacated the injunction and ordered that the complaint be dismissed (Pet. App. A1-A15). The court first held that disclosure of the materials is not forbidden by the Trade Secrets Act, because that Act prohibits only disclosures "not authorized by law." The OFCCP regulations permitting discretionary disclosure of Affirmative Action Programs, the court held, provide legal authorization sufficient to exempt the proposed disclosures from the prohibition of the Trade Secrets Act (Pet. App. A6-A11). The court further held that, even if the Trade Secrets Act forbids disclosure, neither that statute nor the Freedom of Information Act (FOIA) provides a basis for private injunctive relief against disclosure. Neither statute, the Court held, was intended to create a private right of action on behalf of submitters of information; instead, judicial review of agency decisions to disclose assertedly confidential information must be conducted on the administrative record, subject to the standards of review established in the Administrative Procedure Act, 5 U.S.C. 706.

2. Petitioner argues that the proposed disclosures are prohibited by the Trade Secrets Act.[4] As petitioner recognizes (Pet. 6), this issue is before the Court in a closely analogous context in *Chrysler Corp.* v. *Brown*, No. 77-922, certiorari granted, March 6, 1978. Both cases involve requests for a government contractor's Affirmative Action Programs, and both raise the question of the applicability of the Trade Secrets Act to disclosures authorized by OFCCP regulations.

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[4]The three questions presented in the petition all involve closely related issues bearing on whether the Trade Secrets Act prohibits disclosures of the sort at issue in this case.

It is therefore respectfully submitted that the Court should hold this petition for disposition in light of its decision in *Chrysler Corp.* v. *Brown*.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

DOJ-1978-09